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OFFICE OF APPEALS AND DISPUTE RESOLUTION

July 8, 2008

In the Matter of Chris McCarthy

Docket No. 2008-092
DEP File No. JD-08-2309
Gloucester

RECOMMENDED FINAL DECISION

On May 28, 2008, the Office of Appeals and Dispute Resolution ("OADR") received a notice of claim requesting an adjudicatory hearing on the terms of a Determination of Applicability issued under M.G.L. c. 91 ("Chapter 91") and 310 CMR 9.00 ("Waterways Regulations") by the Department of Environmental Protection (the "Department") regarding a residential project at 26-30 Marsh Street, Gloucester. The Petitioner group claims to have status as a "ten citizens" group, and the papers were filed by one, Stevan Goldin, of 14 Hodgkins Street in Gloucester, who claims to be the authorized representative for the group. Chris McCarthy, 90 Dennison Street, Gloucester, is identified as the Applicant.

On review of the notice of claim, I found omissions in the information necessary to determine whether the Petitioner group was a valid ten citizen group with standing to request an adjudicatory hearing. In addition, certain materials required by the M.G.L. c. 30A and the



Adjudicatory Proceeding regulations, 310 CMR 1.01 et seq., to establish the legitimacy of the authorized representative were also missing. Therefore, on June 16, 2008, I issued an Order for a More Definite Statement directing the Petitioner to produce information to demonstrate a right to an adjudicatory hearing and to demonstrate the legitimacy of the authorized representative. In that Order, I also denied a motion for immediate transfer of this matter to the Division of Administrative Law Appeals (“DALA”) on the grounds that the Department had a legitimate and legal basis to require the pre-screening of all appeals through its OADR prior to any transfer to DALA.

In response to the Order for a More Definite Statement, Petitioner forwarded only a renewed request for immediate transfer to DALA claiming that the pre-screening at OADR is “a violation of their constitutional and legal rights” and that the Petitioner does not “recognize the legitimacy of the Department’s purported ‘hearing officers.’” Petitioner’s renewed request for immediate transfer to DALA is a motion to reargue. The consideration of a motion to reargue is completely discretionary and "may be denied if it does no more than repeat arguments that the interlocutory decision rejected." *Matter of McLaughlin, Trustee, ETM Realty Trust*, Docket No. DEP-05-1224, Decision and Order on Motion to Renew or Reargue Stay Denial, 13 DEPR 137 (May 4, 2006). The motion is denied because it repeats all of Petitioner’s arguments that were already rejected.¹ Instead, I consider the Petitioner’s filing of a motion to reargue as a failure to respond to the Order for a More Definite Statement.

¹ Petitioner provides a partial citation to an apparently unpublished Superior Court opinion, *10 Citizen Intervenor Group v. MA D.E.P. and old Colony Maritime*, Pigeon Cove, Rockport, Suffolk Superior Court, C.A. No. 07-03003. No year of decision or source information was provided. I could not locate this opinion through multiple searches of multiple legal sources. Therefore, I am unable to consider it.

There are three grounds for dismissal of Petitioner's notice of claim: (1) failure to prosecute; (2) failure to file a complete claim; and (3) lack of standing. First, Petitioner failed to respond to the Order for a More Definite Statement. Petitioner's authorized representative has been warned in multiple matters before OADR that failure to prosecute an appeal, including a failure to respond adequately to an order of OADR, is subject to the sanction of dismissal. See, 310 CMR 1.01(10); see also, *Matter of Cretarolo*, DEP Docket No. WET-2007-002 Recommended Final Decision (January 18, 2008), adopted by Final Decision (January 23, 2008); *Matter of Dunfudgin, LLC*, Docket No. WET-2008-012, Recommended Final Decision (March 24, 2008), adopted by Final Decision (May 23, 2008); *Matter of Mark Hubbard*, Docket No. 2008-020, Final Decision (March 31, 2008); *Matter of Mark Hubbard*, Docket No. 2008-021, Final Decision (March 31, 2008).

Second, the Adjudicatory Proceeding regulations also require that a complete claim with all required material and information be filed by the deadline for appeal. This includes a requirement for ten citizens' groups to file affidavits by each of the residents in a "ten resident" group in the case where an authorized representative is appearing on their behalf who is not an attorney. See, 310 CMR 1.01(2)(b). This requirement is not simply one of regulation, but is taken from the words of the statute that authorizes ten citizens' group interventions in adjudicatory proceedings, M.G.L. c. 30A, § 10A that "each intervening person shall file an affidavit stating the intent to be part of the group and to be represented by its authorized representative." This requirement is very important to ensure that the citizens whom the authorized representative claims to represent are actually willingly participating in the appeal.

The affidavits filed do not include an affirmation that the residents authorize Mr. Stevan Goldin to act as their authorized representative.²

Third and finally, Petitioner has failed to establish the right to request an adjudicatory hearing and, therefore, lacks standing to bring this appeal. The Waterways Regulations do give a right to request an adjudicatory hearing to groups of “ten residents of the Commonwealth, pursuant to M.G.L. c. 30A, §10A, who have submitted written comments within the public comment period” of a pending administrative proceeding by the Department “to grant or deny a license or permit.” See, 310 CMR 9.17(1)(c). This right to an adjudicatory hearing is expressly grounded in the statutory right to a group of ten citizens to “intervene” in adjudicatory proceedings “in which damage to the environment as defined in section seven A of chapter two hundred and fourteen, is or might be at issue.” See, M.G.L. c. 30A, §10A. Therefore, the right to request an adjudicatory hearing requires that the group of ten citizens had already “intervened” in the Chapter 91 license proceedings before the Department by way of the submission of “written comments during the public comment period.” See, 310 CMR 9.17(1)(c). Failure to submit such comments as required “will result in the waiver of any right to an adjudicatory hearing.” See, 310 CMR 9.13(4)(c). Petitioner does not claim that it submitted written comments to the Department during the Chapter 91 determination of applicability proceedings, nor does it include a copy of any such written comments. Petitioner was warned in the Order for a More Definite Statement that failure to provide the needed information to establish standing would result in dismissal of the appeal. See, 310 CMR 1.01(6)(b) and 1.01(10).

² This omission is particularly troubling in light of the discrepancies between lists of citizens submitted by Mr. Goldin in his materials, and the lack of information about what group of ten citizens participated in prior permit proceedings. These discrepancies are discussed further below.

Standing is jurisdictional and may be raised at any time by the Presiding Officer. See, *Matter of Steven and Diane Miers*, Docket No. DEP-04-434, Recommended Final Decision (March 11, 2005), adopted by Final Decision (March 30, 2005). Lack of standing is a jurisdictional defect in Massachusetts civil practice as well. See, e.g., *Ginther v. Comm'r of Insurance*, 427 Mass. 319, 693 N.E. 2d 153, 156 (1998).

An appeal may be dismissed upon jurisdictional grounds where evidence fails to support claims of standing. Id.; See, *Higgins v. Dept. of Environmental Protection*, 64 Mass. App. Ct. 754; 835 N.E.2d 610; 2005 Mass. App. LEXIS 961 (October 13, 2005) (Demonstration of proof of compliance with Department's regulatory requirements for standing in 310 CMR 9.00 et seq., including prior participation requirement, recognized as prerequisite for right to adjudicatory hearing by Court of Appeals).

For all these reasons, I recommend that the Petitioner's claim for an adjudicatory hearing be dismissed.

NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.

Laurel A. Mackay
Presiding Officer

SERVICE LIST

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Legal representative: None Identified

Applicant: Chris McCarthy
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Legal representative: None Identified

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